

## **APPENDIX B**

UNITED STATES JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION

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IN RE: DIGITAL ADVERTISING  
ANTITRUST LITIGATION

MDL No. 3010  
July 29, 2021  
10:43 a.m.  
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TRANSCRIPT OF ORAL ARGUMENT

Chair: Honorable Karen K. Caldwell, Chair  
United States District Court  
Eastern District of Kentucky

Members: Honorable Catherine D. Perry  
United States District Court  
Eastern District of Missouri

Honorable Nathaniel M. Gorton  
United States District Court  
District of Massachusetts

Honorable Matthew F. Kennelly  
United States District Court  
Northern District of Illinois

Honorable David C. Norton  
United States District Court  
District of South Carolina

Honorable Roger T. Benitez  
United States District Court  
Southern District of California

Honorable Dale A. Kimball  
United States District Court  
District of Utah

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P R O C E E D I N G S

(The following proceedings were held via videoconference before the United States Judicial Panel on Multidistrict Litigation, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on July 29, 2021.)

JUDGE CALDWELL: The panel will now turn to MDL 3010 regarding Digital Advertising Antitrust Litigation.

We'll hear now from Eric Mahr.

Mr. Mahr.

MR. MAHR: Good morning, your Honors. My name is Eric Mahr. I'm with the firm of Freshfields Bruckhaus Deringer. I represent the Google defendants who have moved to centralize the cases before the panel in the Northern District of California for pretrial purposes and for both pretrial and trial purposes in the case of the state plaintiffs.

As the panel advises, I will focus my three minutes on one point of emphasis and on updating the panel on recent events.

Google's ad tech products and services attempt to generate the highest quality matches between on the one side internet publishers who operate websites and apps, and on the other side internet advertisers who seek to place digital advertisements on those websites and apps.

One of the many common issues that pervade these cases

1 before the panel will be whether all or part of Google's ad  
2 tech offering constitutes a two-sided transaction platform. In  
3 Ohio v. American Express, the Supreme Court explained that  
4 antitrust cases addressing two-sided transaction markets, in  
5 those cases competition cannot be accurately assessed by  
6 looking at only one side of the platform in isolation.  
7 Instead, the court needs to evaluate competitive effects on  
8 both sides of the market. As a result, the advertisers' claims  
9 in this litigation will require the court to evaluate  
10 competition on the publishers' side of the market and vice  
11 versa.

12 The misguided approach some of plaintiffs advance here  
13 of breaking this case up and putting the publisher cases in one  
14 district, the advertiser cases in another, and allowing the  
15 states to go forward in yet a third district, would very much  
16 encourage just the error the Supreme Court identified in Ohio  
17 v. American Express. It just to us makes no sense to separate  
18 claims that the Supreme Court has expressly ruled must be  
19 considered together. To do so would risk inconsistent rulings  
20 on these and other key common issues, a risk centralization  
21 would eliminate.

22 Turning to updates, in the eight cases before Judge  
23 Freeman in the Northern District of California, Judge Freeman  
24 remains the only judge in the country to have substantively  
25 engaged with the complex merits of this litigation, and in

1 doing so, she has given the parties important guidance on the  
2 law that will apply to this case. None of the other private  
3 cases around the country have moved forward either on procedure  
4 or substance.

5 In the Eastern District of Texas, the state  
6 plaintiffs' case has actually managed to move backwards over  
7 the last two months. You may recall in their opposition to  
8 centralization, the state plaintiffs told the panel that they  
9 would be taking depositions this summer before this panel even  
10 had a chance to rule on centralization. Well, they certainly  
11 failed in making good on that promise, and in fact, haven't yet  
12 even noticed a deposition.

13 And in just this month, two additional states, South  
14 Carolina and Louisiana, have sought to intervene adding new  
15 state claims. But, more importantly, in its reply brief on its  
16 motion to intervene, South Carolina informed the court that,  
17 quote, the plaintiff states anticipate filing a substantive  
18 amended pleading to possibly winnow down and clarify points  
19 made in the complaint. As a result, not only has been there no  
20 progress in the Eastern District of Texas on the merits or even  
21 on discovery, but we now do not even have an operative  
22 complaint in that case.

23 Thank you.

24 JUDGE CALDWELL: Panel members, do you have questions  
25 for counsel?

1 (No response.)

2 JUDGE CALDWELL: Hearing none, we have your argument,  
3 thank you. You've reserved a minute for rebuttal.

4 We will now hear from Kevin Orsini.

5 MR. ORSINI: Good morning, your Honors. Kevin Orsini  
6 from Cravath, Swaine & Moore on behalf of Facebook.

7 Facebook supports centralization in the Northern  
8 District of California before Judge Freeman.

9 Your Honors, Facebook agrees with Google that all of  
10 the cases that are at issue in Google's petition ought to be  
11 centralized together for the purposes of efficiency for the  
12 courts and the parties. I don't need to repeat their  
13 arguments, but I would like to emphasize two points.

14 First, with respect to Facebook, whatever the panel  
15 does here with respect to the cases not involving Facebook we  
16 do believe that at a minimum the 14 cases in which we are  
17 defendants ought to be centralized, 13 of them are copycat  
18 complaints filed in 13 different districts around the country  
19 involving identical issues requiring identical discovery and at  
20 least one overlapping firm in each of those cases.

21 I think judicial efficiency and efficiency to the  
22 party clearly dictates those should be handled together at  
23 least for pretrial purposes, and the only real issue there is  
24 whether or not we could achieve those efficiencies otherwise  
25 through informal coordination or motion practice in 13 courts.

1 I submit that would be far less efficient.

2 The remaining case in which Facebook is named as a  
3 defendant is pending in D.C., it's actually three cases that  
4 have been consolidated into one. It, too, involves allegations  
5 at its core about the alleged anticompetitive agreement between  
6 Facebook and Google, the very same agreement that is at issue  
7 in the 13 publisher cases. And we submit that case ought to be  
8 also consolidated or centralized for pretrial purposes at least  
9 with those 13 publisher cases.

10 With respect to where the cases ought to be  
11 centralized, we agree with Google that the Northern District of  
12 California, and particularly Judge Freeman, is the best place  
13 to go. Google and Facebook are headquartered there, key  
14 witnesses will be located there. Judge Freeman has extensive  
15 experience not only with Google ad tech cases but with general  
16 antitrust cases also involving Facebook, as contrasted to, for  
17 example, Texas where there really is no connection to the  
18 jurisdiction other than the fact that the State of Texas has  
19 filed their claim in the Eastern District. The witnesses  
20 aren't there, no other plaintiff is located in that  
21 jurisdiction, and we respectfully submit, your Honors, that  
22 it's not nearly as convenient.

23 And with that, I see my time has expired.

24 JUDGE CALDWELL: Thank you, Mr. Orsini.

25 Judge Gorton.



1 JUDGE GORTON: Mr. Orsini, if the panel chose to  
2 centralize but for some reason chose not to send it to the  
3 Northern District of California, what would your second choice  
4 be?

5 MR. ORSINI: Thank you, Judge Gorton. I anticipated  
6 that question because I think you asked me the same one when I  
7 was before the panel for Robinhood a few months ago.

8 We obviously have one case in D.C., but I think the  
9 Southern District of New York would make a lot of sense. Both  
10 parties, both defendants, Facebook and Google, have significant  
11 presence in the Southern District, although they're not  
12 headquartered there; and obviously the Southern District courts  
13 are more than capable of handling MDLs and are very experienced  
14 in that regard.

15 JUDGE GORTON: Thank you.

16 JUDGE CALDWELL: Other questions?

17 (No response.)

18 JUDGE CALDWELL: Hearing none, we have your argument.  
19 Thank you, Mr. Orsini.

20 MR. ORSINI: Thank you, your Honors.

21 JUDGE CALDWELL: The panel will now hear from Kate  
22 Baxter-Kauf.

23 MS. BAXTER-KAUF: Good morning, your Honors. Kate  
24 Baxter-Kauf from Lockridge Grindal Nauen in Minneapolis  
25 appearing today on behalf of SPX Total Body Fitness.

1           We support centralization but not necessarily  
2           consolidation in the Northern District of California.

3           The SPX Total Body Fitness matter is currently pending  
4           in the Northern District of California in front of Judge  
5           Gilliam.

6           Initially I wanted to note that SPX was previously  
7           referred to in the case by the caption Kimberly Negron before  
8           substitution of the proper parties, so there might be  
9           references and other parties that refer to SPX in that way.

10          It is somewhat uniquely situated in so far we  
11          represent a class of advertisers who advertised on Facebook,  
12          which is a different class than some of the other actions.  
13          Judge Freeman has already evaluated our case on a motion to  
14          relate and rejected that SPX was related to the digital  
15          advertisers' or publishers' cases currently pending before her.  
16          As a result, we're currently pending before Judge Gilliam with  
17          a motion to dismiss hearing set -- briefing set to commence  
18          next month.

19          We're happy to proceed in front of either judge but  
20          believe that coordinated discovery will aid all of the actions  
21          and that since all of the defendants, significant witnesses,  
22          and documents will be located in the Northern District of  
23          California, that's the most appropriate forum.

24          Thank you.

25          JUDGE CALDWELL: Questions from the panel?

1 (No response.)

2 JUDGE CALDWELL: Seeing none, we thank you for your  
3 argument.

4 MS. BAXTER-KAUF: Thank you.

5 JUDGE CALDWELL: The panel will now recognize Jordan  
6 Elias.

7 MR. ELIAS: Good morning. Jordan Elias of the Girard  
8 Sharp firm, interim co-lead counsel for the proposed advertiser  
9 class in the Google digital ads case.

10 The advertisers we represent oppose centralization.  
11 Our litigation is proceeding with coordinated advertiser and  
12 publisher tracks, and an MDL would just set things back.

13 Google hasn't adequately addressed the Texas order  
14 denying transfer. A lot of that reasoning also applies to the  
15 issues in front of the panel. For example, our case is going  
16 to involve class certification. The AG case is out in front in  
17 looking at how best to restore competition, and some of the  
18 publisher opt-out cases may involve unique business  
19 relationships.

20 It makes sense for more than one judge to hear cases  
21 that focus on different aspects of this controversy under  
22 different liability theories, especially when the cases are  
23 positioned at different stages with the states in the lead and  
24 our class actions ahead of everything else.

25 Judicial economy favors not interfering with these

1 ongoing proceedings. Beyond the delay an MDL would cause and  
2 the fact that we can coordinate discovery with the usual  
3 methods even without an MDL, I wanted to point out that we have  
4 here not one, but two monopolists in different markets both  
5 urging the panel to create a single MDL.

6 Our clients filed the first case and haven't named  
7 Facebook or claimed overcharges on social media ads. In fact,  
8 we've expressly excluded Facebook from the relevant market, and  
9 our new complaint is going to explain in more detail why  
10 advertising on Facebook isn't a reasonable substitute for  
11 Google's broader set of ad tech services.

12 The panel should not insert Facebook and its market  
13 into ongoing monopoly litigation that's focused on Google and  
14 its markets. That would only further complicate our case.

15 Judge Freeman has already ordered Google to produce in  
16 our case the materials it provided in Texas, and we've been  
17 coordinating closely with Ms. O'Keefe and the other publisher  
18 class counsel.

19 In short, our coordinated litigation is working and  
20 there's no reason to start over again, so the petition should  
21 be denied.

22 Thank you.

23 JUDGE CALDWELL: Judge Kennelly.

24 JUDGE KENNELLY: So I'm a little hesitant to wade into  
25 antitrust because I'm anything but an expert, but as I

1 understand it, the Texas case which is brought on behalf of  
2 half a dozen or maybe 14 states is what's called a *parens*  
3 *patriae* case, which means it's brought on behalf of anybody  
4 that's in that state. Aren't some of those same folks in your  
5 class?

6 MR. ELIAS: I think that is true, and --

7 JUDGE KENNELLY: So how does it make sense then to  
8 have these two cases which basically overlap, particularly if  
9 you have 14 states, and who knows how many others might join  
10 it, in two different places? I'm just not getting that.

11 I have to say that the opposition of you folks and the  
12 other folks on the plaintiffs' side to centralization in this  
13 case is a little bit perplexing because this is the type of  
14 case where in virtually every other situation we have before us  
15 you guys are out in front asking to centralize because you  
16 don't want to have all these gnats in other districts that are  
17 interfering with your cases.

18 MR. ELIAS: Well, your Honor, to take the second part  
19 first, I think the answer is, as I've stated, that we're way  
20 out in front, that we've made considerable progress. Judge  
21 Freeman has already issued a ruling on the motion to dismiss.

22 Our case involves different claims. It doesn't name  
23 Facebook, as some of these other cases do, and so we think that  
24 that should continue and not be disturbed by an MDL. Yes,  
25 and --

1 JUDGE KENNELLY: The first part of my question.

2 MR. ELIAS: So that's a very complex question that  
3 would require further research. Obviously we don't favor  
4 duplicative recovery. There are treble damages available under  
5 the antitrust laws, and so I think that that would be an issue  
6 that would have to be worked out down the road.

7 I'm sorry, I would want to research that further  
8 before responding to that, your Honor.

9 JUDGE CALDWELL: Other questions?

10 (No response.)

11 JUDGE CALDWELL: All right. Thank you very much. We  
12 have your argument.

13 MR. ELIAS: Thank you.

14 JUDGE CALDWELL: The panel will hear from Carol  
15 O'Keefe.

16 MS. O'KEEFE: Good morning, your Honors. I am Carol  
17 O'Keefe with the law firm of Korein Tillery, interim co-lead  
18 counsel with Boies Schiller Flexner and Berger Montague,  
19 representing all online website publishers who use Google's  
20 tools to sell advertising space.

21 Publisher plaintiffs oppose centralization. The panel  
22 should not establish an MDL for two reasons: First, because  
23 efficient informal schedule coordination of discovery is  
24 already occurring; and second, because centralization would  
25 risk blurring several legally relevant distinctions between

1       these cases that otherwise appear deceptively similar.

2               The states have taken the lead in informal  
3       coordination and discovery. Our publishers have benefitted as  
4       Google has been directed to provide us with materials produced  
5       in Texas v. Google.

6               Ongoing informal coordination of discovery will ease  
7       Google's burden where overlap truly exists while enabling  
8       publisher plaintiffs to pursue their discreet claims.

9               Centralization would harm all plaintiff groups because  
10      burdening any single judge with juggling the distinct  
11      governmental interest of the states, the unique interests of  
12      publishers, and the independent interests of advertisers  
13      jeopardizes the progress the states have made. Allowing the  
14      state's case to proceed on its own in Texas with voluntary  
15      coordination will result in the most efficient and speedy  
16      resolution of all cases.

17              This case presents the unusual situation where a  
18      common defendant is accused of antitrust violations in related  
19      but distinct markets. Centralization for pretrial proceedings  
20      could potentially cloud rather than clarify the legal issues.

21              For example, Google's recent briefing on separate  
22      motions to dismiss treated publishers and advertisers with the  
23      same broad brush, ignoring that they used distinct tools and  
24      are suing for Google's abuse of power in separate relevant  
25      markets where Google has harmed different sets of competitors

1 and customers. Centralization would only further muddy those  
2 waters.

3 It is in Google's interest to lump the entirety of  
4 online advertising into one market thereby minimizing its role  
5 and its power. Centralization would advance that interest at  
6 the expense of the analytical clarity required in this  
7 antitrust litigation.

8 JUDGE CALDWELL: Thank you.

9 Question, Judge Kennelly.

10 JUDGE KENNELLY: So a short comment, and then a  
11 question.

12 So the comment would be that if it's really true these  
13 are two distinct markets, I would think a judge would be able  
14 to figure that out, and the fact that one party is arguing  
15 otherwise, that's no different from any other case.

16 My question, though, has to do with the question that  
17 I asked of Mr. Elias and he said that he wanted to do more  
18 research on. So isn't there overlap between the recovery in  
19 the *parens patriae* cases and the other cases, the advertiser  
20 and the publisher cases?

21 MS. O'KEEFE: Absolutely not. 15 USC Section 15c  
22 directs that damages properly allocable to, quote, any business  
23 entity should be excluded from a state's *parens patriae*  
24 antitrust damages.

25 JUDGE KENNELLY: Let me just pick up on that.



1           So a judge dealing with a *parens patriae* case is going  
2           to have to figure out how to carve out individual damages that  
3           are applicable to any particular person.

4           MS. O'KEEFE: Any business entity is going be  
5           excluded. We've got advertisers, we've not publishers, those  
6           are businesses. There's very few individuals who sell online  
7           advertising, very few individuals who buy online advertising.

8           JUDGE KENNELLY: So basically what you're telling  
9           me -- this is why I'm not an expert on this stuff -- what I  
10          think I'm hearing you saying is that businesses are carved out  
11          of the *parens patriae* cases. Did I hear that right?

12          MS. O'KEEFE: In the antitrust context, absolutely.

13          JUDGE KENNELLY: Okay. And so the states -- obviously  
14          I can ask their counsel this -- the states then are actually  
15          suing on behalf of individuals, like people like you or me or  
16          somebody like that?

17          MS. O'KEEFE: The viewers of ads, not their buyers,  
18          not their sellers.

19          JUDGE KENNELLY: Okay. So what's their injury?

20          MS. O'KEEFE: I think that's best addressed to the  
21          state AG, but I will tell you from the publisher perspective,  
22          not making enough ad revenue hinders their ability to provide  
23          content online, and I think all individuals are injured by  
24          that.

25          JUDGE KENNELLY: Basically is the fact that the

1 Chicago Tribune is shrinking every day because they can't make  
2 money. That's hard to quantify.

3 Thanks, I have nothing further.

4 JUDGE CALDWELL: Other judges?

5 (No response.)

6 JUDGE CALDWELL: Thank you very much.

7 The panel will now hear from Serina Vash.

8 MS. VASH: Good afternoon, your Honors. Serina Vash  
9 of Herman Jones, LLP. Together with my colleagues from Robbins  
10 Geller, the Fitzsimmons Law Firm and Farrell and Fuller, we  
11 represent HD Media Company; AIM Media Industry Operating, LLC;  
12 AIM Media Midwest Operating, LLC; AIM Media Texas Operating,  
13 LLC; Brown County Publishing Company; Clarksburg Publishing  
14 Company; Coastal Point, LLC; Eagle Print Company; Essence  
15 Corp.; Emerick Newspapers, Inc.; Flag Publishing, Inc.; Gale  
16 Force Media; and The Journal, Inc., which I will refer to as  
17 the local newspaper plaintiffs.

18 The local newspaper plaintiffs oppose centralization.

19 Your Honors, these 13 cases are brought in the local  
20 district where these local newspaper plaintiffs serve their  
21 local communities, where their witnesses and documents are  
22 located, and where the devastating effect of Google's  
23 anticompetitive conduct, including its bid rigging with  
24 Facebook, are being felt; where journalism news gathering and  
25 investigative reporting, particularly local journalism, are

1 being eviscerated.

2 Centralization as respect these plaintiffs will not  
3 serve the convenience of the parties and the witnesses and will  
4 not promote a just and efficient disposition of the cases.

5 If these local newspaper plaintiffs are tossed into a  
6 large MDL, they will be swallowed up in the maelstrom of class  
7 action cases causing substantial prejudice to already  
8 struggling local newspapers.

9 The relevant evidence is largely in the East Coast.  
10 Google's own evidence, witnesses, and documents are largely in  
11 the Southern District of New York. This case can and will be  
12 informally coordinated; it's not too massive to coordinate.  
13 There are two sets of lawyers that need to coordinate as  
14 respect the newspaper plaintiffs, that is, Herman Jones and our  
15 colleagues, and the Kellogg Hansen associate who represents the  
16 associated the newspapers and the Daily Mail.

17 If the panel is inclined to coordinate, we would favor  
18 the Eastern District of Texas. It is much more convenient for  
19 the newspaper plaintiffs. Google has answered. There's a  
20 trial date. Three million pages of documents and broader  
21 discovery has already been undertaken. The market is in line  
22 with what the newspaper plaintiffs have pled. The harm is in  
23 line with what the newspaper plaintiffs have pled. Allegations  
24 of Facebook are in front of the Eastern District of Texas, and  
25 they have no pending MDLs.

1           Your Honors, speed matters in this case, and speed  
2 favors plaintiffs; delay favors Google.

3           One of our clients is the Westfield Leader. The  
4 Westfield Leader is my local newspaper. The Leader is 131  
5 years old, that's 108 years older than Google and 114 years  
6 older than Facebook.

7           Your Honors have everything you need to make a  
8 decision that will lead to the just --

9           JUDGE CALDWELL: Your time is up.

10          MS. VASH: Thank you, your Honor.

11          JUDGE CALDWELL: All right. Questions from the panel?  
12 (No response.)

13          JUDGE CALDWELL: Hearing none, we thank you for your  
14 argument.

15          MS. VASH: Thank you, Judges.

16          JUDGE CALDWELL: We'll now hear from John Thorne.  
17 Mr. Thorne.

18          MR. THORNE: Thank you, Judge Caldwell, members of the  
19 panel. My name is John Thorne. I'm a partner with Kellogg  
20 Hansen Todd Figel & Frederick. I represent Daily Mail, the  
21 world's most popular English language newspaper and the largest  
22 of the publishers, the private publishers to sue Google in  
23 these cases.

24                 We oppose Google's motion, but if you centralize  
25 further, we have proposed that you divide the work across three

1 district courts.

2 I just want to emphasize two things in this brief  
3 argument. First, the Southern District of New York is the best  
4 forum for the publisher cases, and that's because New York is  
5 the center of publishing. New York is where the harm is most  
6 felt and where most of the witnesses are. There are two  
7 newspaper trade associations that filed amicus briefs with you.  
8 They urge you to centralize the publisher cases in the Southern  
9 District of New York.

10 Google in the transfer argument in Texas counted up  
11 its relevant witnesses and agreed. It has more witnesses in  
12 New York than it does in California. The reason is Google's  
13 search business is in California but its publisher business is  
14 in New York. They got into the publisher business by buying a  
15 company called DoubleClick. DoubleClick was based in New York  
16 because that's where the publishers are. Google has a New York  
17 office that takes up an entire city block of Manhattan on 8th  
18 Avenue between 15th and 16th Streets.

19 Small publishers sued in California because they're  
20 required to under their forum selection clauses with Google.  
21 The big publishers, for the most part, have forum selection  
22 causes requiring them to sue in the Southern District of New  
23 York. You do not need to be a Silicon Valley judge to decide  
24 these cases, but it would help to have some financial markets  
25 experience.

1           We cited in our brief some of the financial markets  
2           antitrust cases decided in the Southern District. Google  
3           didn't respond to those in its reply, but Google cited American  
4           Express and U.S. Airways v. Sabre, those are also cases coming  
5           out of New York.

6           Second point, and I won't belabor this, but it's the  
7           most important point, and that is, there is some urgency here.  
8           Daily Mail is seeking an injunction, the state attorneys  
9           general are seeking injunctive relief; the harm to competition  
10          is ongoing. We cited in our brief Congressional findings that  
11          Google is harming publishers with the conduct that's described  
12          in our complaints.

13          The Chicago Tribune is WGN, Judge Kennelly knows the  
14          world's greatest network newspaper. We have lost 2,000  
15          newspapers in the last decade; we're on pace to lose another  
16          100 newspapers this year.

17          We would urge you to divide the work between we  
18          propose three different district courts in order to try to  
19          expedite the resolution getting to the merits.

20          Thank you.

21          JUDGE CALDWELL: Questions for counsel?

22          (No response.)

23          JUDGE CALDWELL: Hearing none, we'll hear now from  
24          Jonathan Rubin.

25          Counsel, I'm going to ask you to carefully watch the

1 red light. It appears that if you continue to talk, we cannot  
2 interrupt you except by giving visual signals. So we could ask  
3 that you respect our time limitations.

4 Please continue.

5 MR. RUBIN: Good morning. Good morning, and may it  
6 please the court. My name is Jonathan Rubin. I'm with  
7 MoginRubin, LLP. We represent Cliffy Care Landscaping, LLC,  
8 Kinin, Inc., and Raintree Medical and Chiropractic, LLC against  
9 defendants Facebook and Google.

10 The Cliffy Care plaintiffs seek to remain independent.

11 The plaintiffs in Cliffy Care were directly injured by  
12 the 2018 Jedi Blue agreement between Facebook and Google. Our  
13 claim is solely for violation of Section 1 and makes no claim  
14 of monopolization against Google or anyone else under Section  
15 2.

16 Because the complaint seeks liability against the  
17 defendants jointly and severally, Facebook must be made a  
18 defendant before any court to which the case is transferred.  
19 This includes Judge Freeman, who has made her preference clear  
20 not to adjudicate claims or factual issues that affect Facebook  
21 in the midst of a massive two-prong monopolization case by  
22 advertisers and publishers against Google.

23 Google says in their memorandum on page 6 that Judge  
24 Freeman's ruling declining to relate the SPX to the advertiser  
25 cases was an error, but Judge Freeman knows Facebook's business

1 well having presided over Reveal Chat, and her views on this  
2 should be given great deference.

3 No pending action other than Cliffy Care seeks redress  
4 for injuries specifically flowing from the Jedi Blue agreement,  
5 including SPX. SPX names only Google, alleges injury flowing  
6 from Google's advertising monopoly, says nothing about direct  
7 economic effects of the agreement, and is brought by purchasers  
8 of Facebook advertising not directly covered by the Jedi Blue  
9 agreement.

10 And it's similar with the AIM Media 13 local newspaper  
11 cases and the Texas AG cases which tack on a perfunctory  
12 Section 1 count but describe competitive harm that flows from  
13 Google's monopolization and not from the operation of the  
14 agreement itself. Because the claim, legal theory, injury,  
15 parties, and class are fundamentally different, nothing in the  
16 Cliffy Care case will effect the probative value of the Jedi  
17 Blue agreement as evidence of other claims in other courts.  
18 Thus, there is no danger of inconsistent rulings.

19 The Cliffy Care plaintiffs respectfully request to  
20 remain independent, and I thank the panel for its attention.

21 JUDGE CALDWELL: Thank you.

22 Questions for counsel?

23 (No response.)

24 JUDGE CALDWELL: Hearing none, we thank you for your  
25 argument.



1           We will turn to the next counsel, Mark Lanier.

2           MR. LANIER: May it please the court, thank you, your  
3 Honors. My name is Mark Lanier. I represent a number of  
4 the -- well, I represent all of the states and the District of  
5 Puerto Rico, Alaska, Arkansas, Florida, Idaho, Indiana,  
6 Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada,  
7 North and South Dakota, Texas, Utah, and Puerto Rico.

8           I oppose centralization of this case, and with that, I  
9 will commence. May it please the Court.

10           Judge Kennelly, I'm coming straight to you because  
11 this is the first time in my entire life to argue for no  
12 centralization in front of the JPML, and I will be using some  
13 of the arguments that have been used so effectively against me  
14 over the years as I try to do this.

15           There are three arguments to make in two quick  
16 minutes.

17           Number one, urgency. Speed really is important here.  
18 It's important for a number of reasons, including the fact that  
19 there's an inherent amount of immense power that we've seen  
20 exercised in elections and other places as well in the hands of  
21 Google. And we believe that the legislators recognize the  
22 importance of urgency here. We have tried to do what we think  
23 the JPML has urged us to do before, and that is, consolidate  
24 all of these cases. Even the two pending cases wanting to  
25 intervene in Louisiana and South Carolina are seeking our

1 counsel as well, and that I'll represent Louisiana in that  
2 intervention and ultimately South Carolina I expect as well.  
3 So we're trying to consolidate as best as we can without  
4 imposing on the JPML and all that it requires.

5 It's also important for the court to understand that  
6 we've been intensely involved in this. We've got two years  
7 going now because of all of the pretrial work. We took over 50  
8 statements, equivalent to depositions, before filing the case.  
9 We've got over two million documents. We've got documents and  
10 information from 25 third parties at this point. We have won  
11 the 1404 transfer motion because Google uses Texas as one of  
12 its nexus points for all of its technology.

13 So within the framework of that argument, two,  
14 substance. The *parens patriae* not covered here. We are  
15 seeking to recover for individuals in a different sense. For  
16 example, we want to disgorge the private data that's been  
17 secured wrongly by Facebook.

18 Final point, three, clarification. Judge Jordan has  
19 taken a strong look at this case, a strong active involvement.  
20 He's issued a protective order, he's issued a 1404 motion.  
21 We've got discovery under way, we've got -- documents have been  
22 scheduled.

23 Thank you.

24 JUDGE CALDWELL: Questions for Mr. Lanier?

25 Judge Kennelly.

1 JUDGE KENNELLY: I have two, let me ask the first one,  
2 and then I'll ask the other one.

3 The first one goes back to the questions I asked some  
4 of the other folks, which are really more questions for you.

5 So I get that you're asking to break up and I get that  
6 you're asking for disgorgement, but the complaint also says  
7 you're asking for damages. And as I understand the *parens*  
8 *patriae* part of the claim which has been described by some of  
9 the other counsel, you're suing on behalf of natural persons,  
10 quote-unquote, that's what the statute says, and you have to  
11 carve out any business entities or anything like that.

12 So am I right -- so who are the -- what's the damage  
13 to the natural persons in the 14 or so states that you  
14 represent?

15 MR. LANIER: Your Honor, the damage falls by and large  
16 into the civil protection actions that I'd emphasize to you  
17 right now. In Texas it's the deceptive Trade Practices Act.  
18 It says that an entity, like Google, cannot falsely  
19 misrepresent that they're destroying everybody's individual  
20 data and not selling it when, in fact, they are selling it and  
21 they're not destroying it. And so we've got an action for  
22 that. That's not found in any of the class actions that have  
23 been sought. That is solely an individual distinct action.

24 Yes, sir.

25 JUDGE KENNELLY: So my question was what about

1 the Clayton Act. So what are the damages under -- what are the  
2 federal antitrust damages that you can get in a *parens patriae*  
3 case that are distinct from damages to these entities that sue  
4 the publishers and the advertisers?

5 MR. LANIER: Well, the publishers and advertisers will  
6 both have business damages; the State of Texas won't.

7 JUDGE KENNELLY: What are the damages -- in your  
8 complaint, which I'm looking at here, you ask for damages under  
9 section -- under the Sherman Act and at Clayton Act. What are  
10 the damages that are available to you as the representative of  
11 the states, as the representative of their citizens under the  
12 Clayton Act? What's my loss -- if I live in Texas, what's my  
13 loss?

14 MR. LANIER: Your Honor, it would have to be  
15 discovered under -- the expert witnesses will have to come up  
16 with some type of an economic number for the individuals, and  
17 that's different and apart from all of the business numbers.

18 JUDGE KENNELLY: With respect, Mr. Lanier, I asked  
19 that question three times; I didn't get an answer, so I'll just  
20 move on.

21 MR. LANIER: I apologize, Judge. I'm not  
22 understanding the question then because I really thought I was  
23 answering it head on.

24 We don't know the specific amount of damages that  
25 would accrue to each individual person.

1 JUDGE KENNELLY: What's the theory of damages? What's  
2 the theory on which I as an individual person lost money?

3 MR. LANIER: The theory would be the idea that you  
4 ultimately are paying more for products because all of those  
5 products have built within them advertising costs. The  
6 advertising costs are artificially inflated, the cost you spend  
7 for a product is artificially inflated as well. And how the  
8 dynamic of that flows through is going to take some expert  
9 work.

10 JUDGE KENNELLY: Excellent. So what that means,  
11 though, is whoever that expert is, is going to have to divvy  
12 out the harm that flows to me as distinct from the harm that  
13 flows to these advertisers who are having to pay these inflated  
14 rates and the publishers who are having to pay inflated rates  
15 to the advertisers.

16 MR. LANIER: True, true.

17 JUDGE KENNELLY: Isn't that the best argument for all  
18 these cases to be in front of one judge? Somebody is going to  
19 have to sort it out.

20 MR. LANIER: No, your Honor, I don't think it is --  
21 strike that.

22 It's the best argument, but I don't think it's an  
23 adequate argument, because I think what we're dealing with here  
24 is much bigger than this problem at all. But this is why we've  
25 argued in the alternative please put it in Northern Dallas,

1 Plano, Judge Norton.

2 JUDGE KENNELLY: That's a good segue to my second  
3 question, I'll just ask it and then shut up.

4 So my second question is this: I think there's four  
5 districts in Texas, right? Why didn't you choose the Eastern  
6 District as opposed to the Northern District, which is where  
7 Dallas is, where it's close to the capital where the Attorney  
8 General sits or some other district or maybe the district where  
9 your office is, which is Houston.

10 MR. LANIER: Judge Kennelly, I was the one who made  
11 that decision so this is the direct reason: We were able to  
12 file within certain divisions within each district. So when we  
13 filed in the Eastern District, we filed in the Plano division,  
14 which is really just North Dallas. It's the centerpiece; it's  
15 close to the airport. It's -- I don't even understand why it's  
16 not part of part of the Northern District because it's the  
17 Northern District. It gives us all of the access and benefits  
18 of Dallas, but it also gives us an easy-to-get-to courthouse  
19 that has a really fast docket because it exists under the  
20 Eastern District docket rules.

21 JUDGE KENNELLY: Thank you.

22 JUDGE CALDWELL: Thank you very much, Mr. Lanier. We  
23 have your argument.

24 Mr. Mahr, you have one minute reserved.

25 MR. MAHR: Thank you, your Honors. There was a lot of

1 testimony there, and I won't be able to address it all, but I  
2 did think the most compelling testimony was from Mr. Elias and  
3 Ms. O'Keefe who made quite a persuasive case as how well Judge  
4 Freeman is handling these cases, the cases before her, and how  
5 she's worked out the -- handling both the publisher and  
6 advertisers' cases. I understand they might want to keep it to  
7 herself, but I think that the interest of justice and efficient  
8 conduct of these litigations suggest that all the cases should  
9 be there.

10 Second, Judge Kennelly appropriately noted the overlap  
11 between the classes. I haven't seen the states in any way in  
12 the Texas case say that their case only represents individuals,  
13 nor do they concede that they're not representing publishers  
14 and advertisers. They have, in fact, touted the representation  
15 of small businesses not only under the antitrust laws but under  
16 the 30-plus state laws they filed.

17 Finally, I don't think coordination will work. I  
18 think you heard from the state AGs. They want to go faster.  
19 They said they were to going to take depositions without the  
20 others, they didn't do that, but they certainly are not  
21 intending to coordinate.

22 Thank you.

23 JUDGE CALDWELL: All right. Thank you very much.

24 Questions?

25 (No response.)

1 JUDGE CALDWELL: Hearing none, we have your argument,  
2 and that concludes the matter MDL number 3010, and our  
3 arguments for the day.

4 The panel will be in recess.

5 (Court adjourned at 11:20 a.m.)

6 - - - - -

7 CERTIFICATION

8 I certify that the foregoing is a correct transcript  
9 of the record of proceedings in the above-entitled matter to  
10 the best of my skill and ability.

11  
12  
13  
14 /s/Debra M. Joyce  
15 Debra M. Joyce, RMR, CRR, FCRR  
Official Court Reporter

August 3, 2021  
Date